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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

COMMONWEALTH OF KENTUCKY *ex rel.* GREGORY D. STUMBO, Attorney General, Plaintiff, v. ABBOTT LABORATORIES INC., Defendant.	)	CASE NO. 3:05-CV-00048-KKC

DEFENDANT'S RESPONSE TO PLAINTIFF'S NOTICE OF FILING REMAND ORDER IN MINNESOTA AWP CASE

Defendant Abbott Laboratories Inc. ("Abbott") submits this response to plaintiff's Notice of Filing of Remand Order in Minnesota AWP Case ("Notice"). In that Notice, plaintiff brings to the Court's attention: (i) the decision in *State of Minnesota v. Pharmacia Corp.*, No. 05-1394 (PAM/JSM) (D. Minn. Oct. 22, 2005) (Magnuson, J.) ("Op."), and (ii) two recent cases relying on *Grable & Sons Metal Prod., Inc. v. Darue Engineering & Manufacturing*, 125 S. Ct. 2363 (2005), to reject a claim for federal jurisdiction. For the reasons stated below, the Court should not rely on the additional authorities cited by plaintiff to guide the Court's decision on Abbott's motion for a stay pending MDL transfer or plaintiff's motion to remand.

First, a decision to remand now would thwart rather than promote judicial economy. Despite the remands in Alabama, Pennsylvania, Wisconsin and Minnesota, removed AWP cases

brought by state attorneys general are still pending in Illinois, Texas[1] and New York, as well as in this Court. The Illinois, New York and Kentucky cases were set for consideration (without oral argument) at the JPML hearing on November 17, 2005. Contrary to plaintiff's unsupported assertions, the JPML issues orders promptly after each hearing, especially in cases that have been set for consideration without oral argument. Thus, the likely imminent transfer of this case – along with the Illinois and New York cases – to the MDL court will yield substantial savings in judicial resources.

Second, the Minnesota decision is yet another decision that conflicts with the MDL judge's decision in *State of Montana v. Abbott Lab.*, 266 F. Supp. 2d 250 (D. Mass. 2003), on the identical federal question jurisdiction issue, as well as with the decisions of the district courts in Alabama, Pennsylvania and Wisconsin that have reached the same result that the Minnesota court reached.[2] There are now five decisions on the same identical jurisdictional issue that conflict with each other in varying degrees. The interests of judicial economy and consistency of decisions clearly have not been served by each court separately deciding the remand motions. In contrast, permitting this case to be transferred to the pending MDL promotes judicial economy by consolidating cases presenting common questions of fact and federal law before a single judge. Contrary to plaintiff's assertions, those interests *will* be served if this Court exercises its undoubted discretion to stay a decision on the remand motion pending transfer to the MDL judge who has extensive experience with the legal and factual issues that are relevant to the

[1] The Texas case was removed after the Illinois and New York cases and is, therefore, on a different schedule. The JPML, however, has already issued a conditional transfer order transferring the Texas case to MDL 1456. *See* JPML CTO 26 (Exhibit 1). Texas has since filed a notice of opposition to that transfer, but has not yet filed a motion to vacate.

[2] *See State of Alabama v. Abbott Labs., et al.*, No. 2:05cv647-T (M.D. Ala. Aug. 11, 2005) (Alabama's AWP-based claims did not raise a "disputed and substantial" federal issue); *Commonwealth of Pennsylvania v. Tap Pharma. Prod., Inc., et al.*, 2005 WL 2242913, at *6 (E.D. Pa. Sept. 9, 2005) (Pennsylvania's identical *parens patriae* claims do not require a court to ascribe any meaning to the words 'average wholesale price' for

jurisdictional issues. *See, e.g., Meyers v. Bayer AG*, 143 F. Supp. 2d 1044, 1047 (E.D. Wis. 2001).

Third, Abbott submits that the Minnesota court erred in ruling that Minnesota's AWP-based claims do not present a substantial federal question. The Minnesota court characterized the need for a uniform interpretation of AWP under the Medicare statute as the only federal interest at issue in the AWP cases. (Op. at 6.) As the MDL judge recognized, however, the federal interest in this case goes beyond a mere concern for uniform statutory interpretation and extends to potentially hundreds of millions of dollars of federal funds. *See Montana*, 266 F. Supp. 2d at 255 ("The adjudication of whether the term 'average wholesale price' in the Medicare statute embraces a 'spread' could have broad implications for Medicare reimbursements and co-payments."). As we have previously noted, a ruling that defendants fraudulently inflated the 20 percent co-payments of Medicare beneficiaries would necessarily imply that defendants also inflated the remaining 80 percent that is paid by the federal government because both are based on the same AWP. Such a ruling against the numerous defendants in this and related cases would implicate hundreds of millions of dollars of federal funds and presents a paramount federal interest. *See* Defendant's Status Report on JPML Consideration of this Case and Response to Plaintiff's Notice of Remand Order in Wisconsin AWP case (Docket No. 37) at 2-3 (Oct. 20, 2005) ("Defendant's Status Report on JPML Consideration").

In its Notice, plaintiff asserts that in this case "the Commonwealth is not relying on a violation of a federal statute as an element of its state law causes of action." Notice at 5. This

(continued…)

Pennsylvania to prevail"); *State of Wisconsin v. Amgen, Inc., et al.*, 390 F. Supp. 2d 815, 823 (W.D. Wis. 2005) ("[P]laintiff's claims present a substantial and disputed question of federal law.").

statement mischaracterizes both the complaint and the test for federal jurisdiction. The Commonwealth's claims based on Medicare co-payments place at issue the meaning of the term "Average Wholesale Price" as the term is used in the federal Medicare statute. *See* Plaintiff's Amended Complaint, ¶¶ 1-3, 13-31, 33-34 (Oct. 15, 2003). That is the first test for federal jurisdiction. *See Grable*, 125 S. Ct. at 2368 (state law claim giving rise to federal question jurisdiction must raise "actually disputed and substantial" question of federal law). Plaintiff goes on to assert that "the absence of a private right of action" in the Medicare statute "further supports a finding that federal jurisdiction is lacking." Notice at 5. This contention, of course, is entirely contrary to the holding of *Grable* that a private right of action is *not* required for federal jurisdiction. *See id.* at 2366, 2369-70.

Fourth, Abbott submits that the Minnesota court also incorrectly adopted the reasoning of the Wisconsin court that removing a state's AWP-based claims to federal court would disrupt the division of labor between federal and state courts. (Op. at 6-7.) The observations that Abbott submitted to this Court regarding Judge Crabb's reasoning apply equally to Judge Magnuson's decision. Removal of the AWP cases brought by state attorneys general to federal court would not open the floodgates to garden-variety tort cases because these are not routine state tort cases, and the meaning of the federal Medicare statute is essential to resolution of the *parens patriae* claims. *See* Defendant's Status Report on JPML Consideration at 3-4.

The two additional decisions that plaintiff discusses in its Notice – *Leggette v. Washington Mutual Bank, FA*, 2005 WL 2679699 (N.D. Tex. Oct. 19, 2005), and *Sarantino v. American Airlines, Inc.*, 2005 WL 2406024 (E.D. Mo. Sept. 29, 2005) – do not undermine Abbott's position. In both cases, the state law claims brought by private individuals at issue did not present the type of unique state law claims based on a disputed question of federal law that

parens patriae claims brought by a state attorney general, such as plaintiff's do in this case. *See Leggette*, 2005 WL 2679699 at *4 (homeowner's state law contract and foreclosure claims that depended on disputed question of federal housing regulations could open the courts to hundreds of thousands of claims); *Sarantino*, 2005 WL 2406024, at *8 (state law negligence claims brought by private individual based on federal aviation regulations against airline for plane crash could open federal courts to "a tremendous number of cases" based on similar facts) (citation omitted). Moreover, a recent decision by the Second Circuit Court of Appeals applying *Grable* recognized that when a "rare" state law claim depends on a disputed federal statute, such as plaintiff's *parens patriae* claims do here, federal question jurisdiction is proper because it will not disturb the division of labor between state and federal courts envisioned by Congress. *See Broder v. Cablevision Systems Corp.*, 418 F.3d 187, 196 (2d Cir. 2005) ("We think it is likely to be the rare New York breach-of-contract action or suit under [other New York statutes] ... that seeks to assert a private right of action for violation of a federal law [determining applicable rates to be charged cable customers] otherwise lacking one.").

Fifth, the Minnesota court's rationale for holding that defendants' removal was untimely does not apply in this case. The court held that *Johansen v. Employee Ben. Claims, Inc.*, 668 F. Supp. 1294 (D. Minn. 1989), controlled its decision because *Johansen* was issued by a Minnesota district court and had not been directly overruled. (Op. at 4.) This court, however, is not obligated to follow that decision. The decisions in *Doe v. American Red Cross*, 14 F.3d 196 (3d Cir. 1993), and *Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263 (5th Cir. 2001), both issued after *Johansen*, make clear that, contrary to *Johansen*, an "order or other paper" can be an intervening judicial decision and need not be generated in the underlying state proceeding in order to trigger the removal right under section 1446(b). Moreover, as the Minnesota court

recognized (Op. at 5), these two cases limited their holdings to the term "order." Abbott respectfully submits that this reasoning leads to the contradictory result that the broader term "other paper" must be construed more narrowly than the specific term "order," a holding that violates a fundamental rule of statutory construction.

Finally, in denying defendants' motion for a stay pending transfer to the AWP MDL, the Minnesota court mistakenly relied on *Commonwealth of Pennsylvania v. Tap Pharma. Prod. Inc., et al.*, 2005 WL 2242913 (E.D. Pa. Sept. 9, 2005), in which the court concluded that it could not rule on defendants' motion to stay unless it first determined that federal jurisdiction existed. *See id.* at *3. As we have previously demonstrated, this view ignores numerous cases holding that courts can enter stays before ruling on remand motions pending transfer to an MDL court.[3]

For the reasons stated above, this court should decline to follow the three recent supplemental authorities submitted by plaintiff.

Dated: November 30, 2005

Respectfully submitted,

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[3] See, *e.g., In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990) (recognizing authority to stay action despite pending remand motion); *Gaffney v. Merck & Co.*, 2005 WL 1700772, at *1 (W.D. Tenn. July 19, 2005) ("Although some courts have opted to rule on pending motions to remand prior to the MDL Panel's decision on transfer, ... there are many more that have chosen to grant a stay, even if a motion to remand is filed.") (citations omitted); *Michael v. Warner-Lambert Co.*, 2003 U.S. Dist. LEXIS 21525, at *3 (S.D. Cal. Nov. 20, 2003) (Exhibit 2); *Bd. of Trustees v. WorldCom, Inc.*, 244 F. Supp. 2d 900, 902 (N.D. Ill. 2002); *Med. Soc'y v. Conn. Gen. Corp.*, 187 F. Supp. 2d 89, 91 (S.D.N.Y. 2001); *Aikins v. Microsoft Corp.*, 2000 WL 310391, at *1 (E.D. La. Mar. 24, 2000); *Tench v. Jackson Nat'l Life Ins. Co.*, 1999 WL 1044923, at *1-2 (N.D. Ill. Nov. 12, 1999); *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1362 (C.D. Cal. 1997); *Johnson v. AMR Corp.*, 1996 WL 164415, at *3-4 (N.D. Ill. Apr. 3, 1996); *In re Amino Acid Lysine Antitrust Litig.*, 910 F. Supp. 696, 700 (J.P.M.L. 1995). As we have also demonstrated, the decision in *Farkas v. Bridgestone/Firestone, Inc.*, 113 F. Supp. 1077 (W.D. Ky. 2001), does not require this Court to decide the jurisdictional issue before addressing defendants' motion for a stay. *See* Defendant's Reply Memorandum in Support of Defendant's Motion To Stay, 5-8 (Aug. 23, 2005).

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